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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/652,021	08/29/2003	Kenneth W. Boyd	TUC920030078US1	9667
49080	7590	02/15/2006	EXAMINER	
DALE F. REGELMAN 4231 S. FREMONT AVENUE TUCSON, AZ 85714			TRAN, DENISE	
			ART UNIT	PAPER NUMBER
			2185	

DATE MAILED: 02/15/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 10/652,021	<b>Applicant(s)</b> BOYD ET AL.	
	<b>Examiner</b> Denise Tran	<b>Art Unit</b> 2185	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 14 March 2005.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-3 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 1-20 is/are allowed.
- 6) ☒ Claim(s) 21-30 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>8/29/03</u> . | 6) <input type="checkbox"/> Other: _____  |

### **DETAILED ACTION**

1. Claims 1-30 are presented for examination.
2. The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, claim 11, lines 21-26 the determining if the (n) th time to complete for said article of manufacture is greater than . . . article of manufacture is greater than . . . " and claims 12-20 contain similar problems as claim 11, must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner,

the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

3. The specification is objected to as failing to provide proper antecedent basis for the claimed subject matter. See 37 CFR 1.75(d)(1) and MPEP § 608.01(o). Correction of the following is required: claim 11, lines 21-26 the “determining if the (n) th time to complete for said article of manufacture is greater than . . . article of manufacture is greater than . . . ” and claims 12-20 contain similar problems as claim 11.

4. Claim 21 is objected to because of the following informalities: it appears that “usable with a usable with” should be –usable with–. Appropriate correction is required.

5. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

6. Claims 21-30 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

As per claim 21, it is unclear whether the program code is embodied in the computer program product or in the computer processor. It is assumed that the code is in the product

7. 35 U.S.C. 101 reads as follows:

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Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

8. Claims 21-30 are rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter. Since a computer program is merely a set of instructions capable of being executed by a computer, the computer program itself is not a process and Office personnel should treat a claim for a computer program, without the computer-readable medium needed to realize the computer program's functionality, as nonstatutory functional descriptive material.

9. Claims 1-30 are allowable over the prior art of record.

10. The following is a statement of reasons for the indication of allowable subject matter: None of the prior art of record shows a method/an article of manufacture/ a computer program product to adjust the data transfer rate for one of (N) primary backup appliances, comprising the steps of:

providing a first one of said (N) primary backup appliances, wherein said first primary backup appliance is capable of communicating with a first one of said one or more secondary backup appliances;

forming by said first primary backup appliance at least one consistent transactions set comprising information received from said one or more first data storage and retrieval systems;

receiving the (n)th and (n+1) status signal from each of the other (N-1) primary backup appliances;

calculating the (n)th effective bandwidth for each of said (N) primary backup appliances;

calculating the (n)th time to complete for each of said (N) primary backup appliances;

calculating the (n)th effective aggregate bandwidth for all (N) primary appliances;

determining if the (n)th time to complete for said first primary backup appliance/ of said article of manufacture is greater than the (n)th time to complete for each of the other (N-1) primary backup appliances; and

operative if the (n)th time to complete for said first primary backup appliance/ for said article of manufacture is greater than the (n)th time to complete for each of the other (N-1) primary backup appliances, providing all or part of at least one consistent transactions set from said first primary backup appliance to said first secondary backup appliance with no delay in combination with the other limitations of claims 1, 11, and 21

11. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

- a) Brown et al. (US 2005/0108420) shows dynamic measurement of bandwidth;
- b) Griffith et al. (6401170) shows detecting heartbeat of storage controllers ;
- c) Wahl et al. (6324654) shows changing a transfer rate of a primary daemon;
- d) Boyd et al. (US20050021591) shows updating transfer time measurements

12. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Denise Tran whose telephone number is (571) 272-4189. The examiner can normally be reached on Monday, Thursday, and an alternate Friday from 8:45 a.m. to 5:15 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Matt Kim, can be reached on 571-272-4182. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Denise Tran

2/6/06